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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re Jerry V., a Person Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

GERARDO V.,

Defendant and Appellant.

D054936

(Super. Ct. No. SJ012035)

APPEAL from judgments and orders of the Superior Court of San Diego County,  
Susan D. Huguenor, Judge. Affirmed.

Gerardo V. appeals a dispositional order denying reunification services to him  
under Welfare and Institutions Code<sup>1</sup> section 361, subdivisions (b)(4) and (c). We affirm  
the order.

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<sup>1</sup> Further statutory references are to the Welfare and Institutions Code unless  
otherwise specified.

# I

## FACTUAL AND PROCEDURAL BACKGROUND

Jerry V., born December 2006, is the son of Gerardo V. and A.P.<sup>2</sup> (together, parents). On the evening of July 12, 2008, Jerry and his five-month old brother, John, were in Gerardo's sole care. During bathtime, Gerardo left the children unattended and John drowned.

The San Diego County Health and Human Services Agency (Agency) filed a petition alleging Jerry was a child described by section 300, subdivision (f), because his father caused the death of another child through abuse or neglect. The court detained Jerry in foster care pending further hearing. A.P. sought custody of Jerry. She and Gerardo reported they were no longer living together.

At the jurisdiction and disposition hearing on March 27 and 30, 2009,<sup>3</sup> the court sustained the section 300 petition. The court removed Jerry from parental custody and ordered a plan of reunification services for A.P., and denied reunification services to Gerardo under section 361.5, subdivision (b)(4).

Because the only issue raised on appeal is whether the court erred when it determined reunification with Gerardo was not in Jerry's best interest under section 361.5, subdivision (c), which permits the court to grant reunification services to a parent

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<sup>2</sup> A.P. does not appeal. She is referred to only when relevant to the issues raised in Gerardo's appeal.

<sup>3</sup> The court continued the hearing a number of times for good cause.

to whom section 361.5, subdivision (b)(4) applies, we summarize the evidence relevant to that issue, keeping in mind we view the evidence in the light most favorable to the prevailing party. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1096, citing *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

Before discussing the evidence that was presented at the disposition hearing, we briefly describe the factual background preceding the hearing.

On July 12, 2009, San Diego County Sheriff's Department Homicide Detective Angela Tsuida, the San Diego Medical Examiner (ME) and a Child Abuse Detective interviewed Gerardo. Gerardo told the investigators he bathed the children after dinner. After letting the children play for approximately thirty minutes, Gerardo left to use the other bathroom. John was sitting on a plastic booster chair not intended for bathtub use. When Gerardo returned, he found John face down in the bathtub. He attempted to resuscitate John and then telephoned for emergency assistance (911 call) at approximately 8:00 P.M.

A few days later, Detective Tsuida told an Agency social worker that he was not persuaded by Gerardo's account of the events. During the initial search of the home, investigators had seized an hour-long digital video recording of the children in the bathtub (video).<sup>4</sup> The video ended approximately 40 minutes before the 911 call. It

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<sup>4</sup> The parents had many videos of the children. A.P. said Gerardo liked to videotape the children playing alone because the children did funny things when they thought no one was watching them.

showed the children playing in the bathtub without supervision. The video ended before John was in any distress.

Gerardo cooperated with law enforcement and voluntarily participated in four polygraph examinations. Examiners determined there was no indication of deception. ME concluded that the manner of John's death was accidental. In September 2008 Detective Tsuida informed the social worker the San Diego County Sheriff did not intend to file criminal charges against Gerardo.

At the hearing, the court admitted in evidence the Agency's jurisdiction and disposition report and addendums, and the detention report. The court stated it had read the Agency's reports and had viewed the video. Over Gerardo's objection, the court admitted the video.<sup>5</sup>

The Agency called witnesses Rebecca Tolson, the social worker assigned to the case, and Marvin Galper, Ph.D., a clinical psychologist who conducted a psychological evaluation of Gerardo. Gerardo's therapist, Roberto Weiss, M.A., MCT, testified on his behalf.

In her report, Tolson stated the Agency considered many factors when it assessed whether it was in Jerry's best interest to offer reunification services to Gerardo. He did not understand how his lack of supervision caused John's death. Gerardo had a significant history of abusive behavior that included an arrest for striking A.P. in the head

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<sup>5</sup> To avoid repetition, we describe the procedural background of the motion to exclude the video under Evidence Code section 352 in part, II.C, *post*, at page 11.

and face when she was pregnant with John and a sustained child abuse referral for physically abusing a younger brother who had been in his care. A.P. said Gerardo spanked three-month old Jerry on the buttocks because he would not stop crying. In addition to the act of domestic violence for which Gerardo was arrested, A.P. stated there were two other incidents she did not report to the police. One of those incidents occurred when she was eight months pregnant with Jerry.

Tolson reported the video showed that Gerardo was present during the first few seconds of the video and for a few seconds approximately one-half hour later. With those exceptions, the video did not show that Gerardo was supervising the children. During one portion of the video, the audio indicated Gerardo was working in another area of the home. Several times, John fell face down in the water. By the end of the hour-long video, both children were crying. Jerry had emptied the bathtub and was standing up, looking for someone. John was so tired he could not sit upright.

According to Gerardo's earlier statements, he then turned on the shower to rinse the children. He refilled the bathtub with six to seven inches of water and planned to let the children play for another 10 to 15 minutes. At that time Gerardo left for approximately three minutes. He returned to find John face down in the water. Gerardo maintained he was present while the children were in the bathtub and left for only a few minutes on four occasions. He told his therapist he was "around."

Tolson testified that Gerardo was a charismatic, articulate, amicable, educated and courteous person. His visits with Jerry were positive and Jerry was happy during the visits. However, Gerardo continued to minimize and rationalize his behavior. Although

Tolson saw "glimmers" of improvement, she did not believe Gerardo had the ability to internalize services to the extent he would be able to safely parent Jerry. The Agency's goal was reunification with A.P., who needed to focus on her role as an independent, protective parent.

Dr. Galper testified that Gerardo displayed a personality structure that was typical among persons who had experienced marked deprivations during childhood. This generally led to difficulties in adequate parenting as adults. He believed Gerardo displayed sociopathic personality traits, by which he meant Gerardo had not adequately internalized a conventional social conscience and was capable of violating social norms without much remorse or guilt. As examples, Dr. Galper cited Gerardo's domestic violence against A.P. and physical abuse of his brother.

Dr. Galper believed it was highly unlikely Gerardo would experience sufficient personal growth with therapy to be capable of safely parenting Jerry within one year.

Dr. Galper had not yet watched the video when he made his first diagnostic impressions. The video reinforced his initial impressions of Gerardo's character because it showed that Gerardo displayed a lack of tenderness toward the children.

Roberto Weiss provided individual therapy to Gerardo. Weiss reviewed the video with Gerardo. Gerardo cried and blamed himself for John's death. His denial in the aftermath of John's death was one of the stages of grief. Gerardo recently showed more insight and openly acknowledged he was responsible for his son's death. Gerardo's progress in therapy exceeded Weiss' initial expectations.

The court found that Gerardo did not meet his heavy burden to show reunification with Gerardo was in Jerry's best interest. The court stated, "Not an easy case. I found the [video] difficult to watch. You keep reaching for it through the screen and it seems to be neglect up to the level of indifference to the needs and safety of the two children." The court ordered the Agency not to provide reunification services to Gerardo.

## II

### DISCUSSION

#### A

##### *The Parties' Contentions*

Gerardo asserts the court erred when it did not find that reunification with him was in Jerry's best interests, and denied his request for reunification services. (§ 361.5, subd. (c).) He argues the video should have been excluded because it was more prejudicial than probative and therefore the court abused its discretion when it admitted the video in evidence. (Evid. Code, § 352.)

Minor's counsel joins in the arguments set forth in Gerardo's brief and requests reversal of the court's findings and orders.

The Agency contends the court acted within its discretion when it determined Gerardo did not meet his burden to show, by clear and convincing evidence, that reunification with Gerardo would be in Jerry's best interests. It contends the court properly admitted the video.

## B

### *Statutory Framework and Standard of Review*

After the court assumes jurisdiction under section 300, the court hears evidence to consider whether removal of the child from parental custody is required. (§ 361, subd. (c).) The court also determines the nature and extent of services to be provided to the child's parents or parent. (§§ 358, 361.)

If the child is removed from parental custody, family reunification services play a critical role in dependency proceedings. (*In re Alanna A.* (2005) 135 Cal.App.4th 555, 563.) There is no general exception to the provision of reunification services; before the court may deny reunification services to a parent, it must find by clear and convincing evidence that one or more of the provisions described in section 361.5, subdivision (b), apply. (§ 361.5, subd. (b)(1)-(15).) The applicable provision here states: "That the parent . . . of the child has caused the death of another child through abuse or neglect." (§ 361.5, subd. (b)(4).)

If a parent is described by subdivision (b)(1), (2) and (5) of section 361.5, the court may order reunification services to be provided to that parent. However, if a parent described by the other provisions of section 361.5, subdivision (b), including the provision applicable here, the court is prohibited from ordering reunification services to the parent unless it finds, by clear and convincing evidence, that reunification with that parent is in the best interest of the child.



The court has broad discretion to determine whether offering reunification services to a parent would be in the child's best interests. (§ 361.5, subd. (c); *In re Angelique C.* (2003) 113 Cal.App.4th 509, 523; *In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 474.)

A reviewing court will reverse an order denying services only if the court has clearly abused its discretion. (*In re Angelique C.*, *supra*, at pp. 523-524; *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96, fn. 6.)

The abuse of discretion standard gives the court substantial latitude; however, the scope of discretion is determined by the legal principles governing the subject of the action. A judicial determination that falls outside the applicable principles of law constitutes an abuse of discretion. (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 119.)

## C

### *The Court Did Not Abuse Its Discretion When It Denied Gerardo's Objection Under Evidence Code Section 352*

Gerardo argues the court erroneously admitted the video in evidence. He asserts the court made a procedural error when it overruled his section 352 objection without first reviewing the video. Gerardo argues the video had slight probative value because its content was described by the social worker's report and testimony. He contends the video had substantial emotional impact and unduly prejudiced the trial court.

The Agency asserts Gerardo forfeited his claim of procedural error by not raising the issue in the trial court; however, any necessary findings may be implied by this court under the facts of this case. The Agency argues the video did not specifically tend to

evoke an emotional response and its evidence was highly relevant because it clearly shows Gerardo was not supervising the children, thus the video did not create a danger of undue prejudice and the court did not abuse its discretion when it admitted the video.

Section 358 governs the admission of evidence in a dependency dispositional hearing. It provides in pertinent part: "Before determining the appropriate disposition, the court shall receive in evidence the social study of the child made by the social worker, any study or evaluation made by a child advocate appointed by the court, and other relevant and material evidence as may be offered, . . ." (§ 358, subd. (b); Cal. Rules of Court, rule 5.690(b).) The purpose of section 358's broad evidentiary rule is to permit the court to consider all relevant evidence when it determines the best interest of the child. (*In re Corey A.* (1991) 227 Cal.App.3d 339, 346-347 (*Corey A.*); *In re Vincent G.* (2008) 162 Cal.App.4th 238, 243 (*Vincent G.*).)<sup>6</sup>

Evidence Code, section 352 states in pertinent part the court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. (Evid. Code, § 352.) Evidence creates

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<sup>6</sup> In cases concerning the admissibility of hearsay evidence at disposition hearing, reviewing courts have stated that the statutory language of section 358 leaves no room for interpretation; the statute clearly permits the admission of all relevant and material evidence. (*Corey A.*, *supra*, 227 Cal.App.3d at pp. 346-347) [dependency disposition hearings]; *Vincent G.*, *supra*, 162 Cal.App.4th at pp. 243-244 [extending the reasoning in *Corey A.* to delinquency disposition hearings].) However, no court has reviewed whether Evidence Code section 352 applies to bar the admission of otherwise relevant and material evidence in juvenile disposition hearings. This issue has not been raised by the parties. Therefore, for purposes of this appeal, we will assume, without deciding, that Evidence Code section 352 applies to a disposition hearing conducted under section 358.

"undue prejudice" when it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues."

(*People v. Robinson* (2005) 37 Cal.4th 592, 632.)

"The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules. (Citations)." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) " 'The [trial] court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighed its probative value.' " (*People v. Jennings, supra*, at pp. 1314-1315, citing *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396.)

With respect to Gerardo's procedural claim of error, we note the following pertinent facts. The social worker received a copy of the video (in DVD format) on January 13, 2009. On January 26 county counsel distributed a copy of the video to the court and all counsel. At a pre-trial conference on March 4, Gerardo objected to the court's review of the video under Evidence Code section 352. County counsel stated the Agency's recommendation to deny reunification services to Gerardo was based in large part on the length of time the children were left in the bathtub with minimal supervision. Counsel stated the court would have to watch the video to determine whether it was more prejudicial than probative.

The court ruled if the video was offered into evidence and if it was admissible, the court would view the video and "overrule [the] objection" (March 4 ruling). At the

jurisdiction and disposition hearing on March 27, the Agency offered the video in evidence. Gerardo objected to its admission. The court stated it had viewed the video and overruled the objection.

Gerardo argues the court denied his motion at the March 4 hearing without reviewing the video to determine whether its prejudicial effect outweighed its probative value under Evidence Code section 352. We are not persuaded by Gerardo's argument.

Viewed in the context of the subsequent proceedings, it is clear the court's March 4 ruling was tentative. While the court may have more clearly phrased its tentative ruling, the record as a whole shows that the court admitted the video in evidence on March 27 after balancing its probative value against any danger of undue prejudice. (Evid. Code, § 352; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 599 [the record as a whole should show the court understood and undertook its obligation to weigh the proffered evidence].) We conclude the court properly considered the admissibility of the video under Evidence Code section 352.

Gerardo argues the video was only marginally relevant to the contested issue because he and A.P. did not contest jurisdiction. We disagree. The video was highly relevant to the issue whether reunification with Gerardo was in Jerry's best interests. At trial, the Agency's position was Gerardo should be denied reunification services because John's death resulted from Gerardo's gross negligence. Gerardo argued that while he made a serious mistake, he was an attentive, devoted and loving father to Jerry, and reunification was in Jerry's best interests.

Gerardo argues the content of the video is profoundly disturbing and carries "an emotional wallop [that] few pieces of evidence can match." In support, he cites the trial court judge's statement she found it difficult to watch the video. Gerardo posits it is impossible not to have an emotional reaction to the sight of the children splashing water in the bathtub, when the viewer knows the tragic outcome. He does not explain how this may have affected the court's decision.

Gerardo conceded, and the testimonial and written evidence shows, that his five-month-old son drowned in the bathtub when Gerardo left him without supervision. That is the immutable "emotional wallop" of this case. The underlying facts were known. The video did not show the actual event. In view of the highly probative value of the video to show the extent of Gerardo's negligence toward the children and the minimal risk of any danger of undue prejudice to the trier of fact, we conclude the court did not abuse its discretion when it admitted the video in evidence over Gerardo's objection. (Evid. Code, § 352; *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008 [unless the danger of undue prejudice substantially outweighs the probative value of the evidence, a section 352 objection should fail].)

## D

### *The Court Properly Exercised Its Discretion When It Determined Reunification With Gerardo Was Not In Jerry's Best Interest*

Gerardo argues the circumstances of this case are not comparable to other cases in which the application of section 361.5, subdivision (b)(4) has been upheld by the reviewing courts. He contrasts his negligence with the ongoing, extreme physical abuse

of an infant described in *In re Ethan N.* (2004) 122 Cal.App.4th 55, 61 (*Ethan N.*) and *In re Alexis M.* (1997) 54 Cal.App.4th 848, 850-851 (*Alexis M.*). Gerardo contends that unlike the parent in each of those cases, he did not intentionally harm or neglect his child.

Gerardo acknowledges this court does not determine the credibility of witnesses or resolve conflicts in the evidence. (See *In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Notwithstanding this basic principle of appellate review, he argues the trial court should have placed greater emphasis on factors other than social worker Tolson's and Dr. Galper's opinions. Gerardo cites his and Jerry's mutual love and affection, the progress he made through participation in therapy and other services, the lack of any substance abuse problem, and the conclusions of other county agencies that John's death was accidental and no criminal charges would be filed. He asserts had the court properly considered the evidence, it would have found that reunification with him was in Jerry's best interest.

Because the "best interest of the child" is the central issue raised in this appeal, we explain its significance both in its broader sense and in the context of overcoming the prohibition against ordering reunification services to a parent that caused the death of another child by abuse or neglect. (§ 361.5, subds. (b)(4) & (c).)

It is axiomatic that the best interest of the child is the fundamental concern of the juvenile dependency system. This concern underlies the system's primary goals of child safety and well-being, preservation of the natural family and timely permanency and stability for a dependent child. (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) A determination of the child's best interest varies according to the gravity of the problem

that led to the dependency proceedings, the child's needs and attachments, and the parent's history and circumstances. (*Ethan N.*, *supra*, 122 Cal.App.4th at pp. 66-67; see *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

The *Ethan N.* court noted the gravity of the problem created when a child's death places that parent's interest in reunifying with his or her surviving child directly at odds with the child's interest in a safe, secure placement with a competent caregiver. (*Ethan N.*, *supra*, 122 Cal.App.4th at pp. 66-67.) The court stated:

"The concept of a child's best interest 'is an elusive guideline that belies rigid definition . . . ' (Citation.) To that end, a court called upon to determine whether reunification would be in a child's best interest may, indeed, consider a parent's current efforts and fitness as well as the parent's history. (Citation.) It must be noted, nonetheless, that the absence or amelioration of the problems that led to the dependency of siblings cannot alone support a finding of best interest for the purpose of section 361.5, subdivisions (b)(4) and (c). (Citation.) The absence of a negative does not, in this context at least, make a positive. The parent responsible for the previous death of another child must affirmatively show that reunification would be in the best interest of a surviving child." (*Id.*, at p. 66.)

Simply stated, in these circumstances, a dependent child has, at minimum, a compelling interest in a home that provides a full measure of physical and emotional safety and security. (Cf. *In re Marilyn H.* (1993) 5 Cal.4th 295, 306; *In re William B.*, *supra*, 163 Cal.App.4th at p. 1228.) When the parent has caused the death of another child, whether through abuse or neglect, that parent faces an "enormous hurdle" when seeking reunification with his or her surviving child. (*Ethan N.*, *supra*, 122 Cal.App.4th at p. 68.)

We acknowledge minor's counsel supported a grant of reunification services to Gerardo at trial and requests reversal of the trial court's decision on appeal. The record contains some evidence to show that Jerry was close to Gerardo and happily engaged with during visits, and Gerardo participated in programs and made some progress in therapy. There is no doubt the acts described in *Ethan N.* and *Alexis M.* are shocking examples of intentional physical abuse of an infant. (*Alexis M.*, *supra*, 54 Cal.App.4th at p. 851.) Those extreme cases do not make the facts of this case less disturbing, Gerardo less responsible or Jerry's interest in a safe and secure permanent home less compelling.

The record clearly supports the court's determination Gerardo did not meet his heavy burden to show that reunification with him was in Jerry's best interest. Gerardo was almost continuously absent when the children were bathing. John was not stable in his booster chair and could not continuously hold himself up. He tipped face down into the water several times. Contrary to Gerardo's assertion the children were happy and still playing after an hour-long bath, the video showed the children were tired, crying and "clearly distressed." But for Gerardo's indifference to the children's safety and well-being, John's death could have been avoided.

Jerry was a toddler. Gerardo's negligence not only led to tragic consequences for John, but also placed Jerry, then 19 months old, at substantial risk of serious injury or death. Jerry was bonded with A.P., who had been a victim of Gerardo's violence. Therapist Weiss noted Gerardo continued to minimize his history of domestic violence, and blamed A.P. for his assaults on her. Social worker Tolson detailed Gerardo's denials of responsibility and the passage of time before Gerardo began to recognize the extent of



his deficiencies as a parent. Dr. Galper concluded that Gerardo had a poor prognosis for meaningful change and would not be able to safely parent Jerry within the statutory reunification time limits.

Jerry is entitled to a timely and permanent placement with a caregiver who is fully committed to him, attentive and sensitive to his needs and capable of diligently ensuring his safety. (Cf. *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 306.) The court properly exercised its discretion when it found that reunification with Gerardo was not in Jerry's best interests. (§ 361.5, subd. (c).)

#### DISPOSITION

The order is affirmed.

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IRION, J.

WE CONCUR:

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HALLER, Acting P. J.

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AARON, J.